No. 743

In the Supreme Court of the United States

OCTOBER TERM, 1948

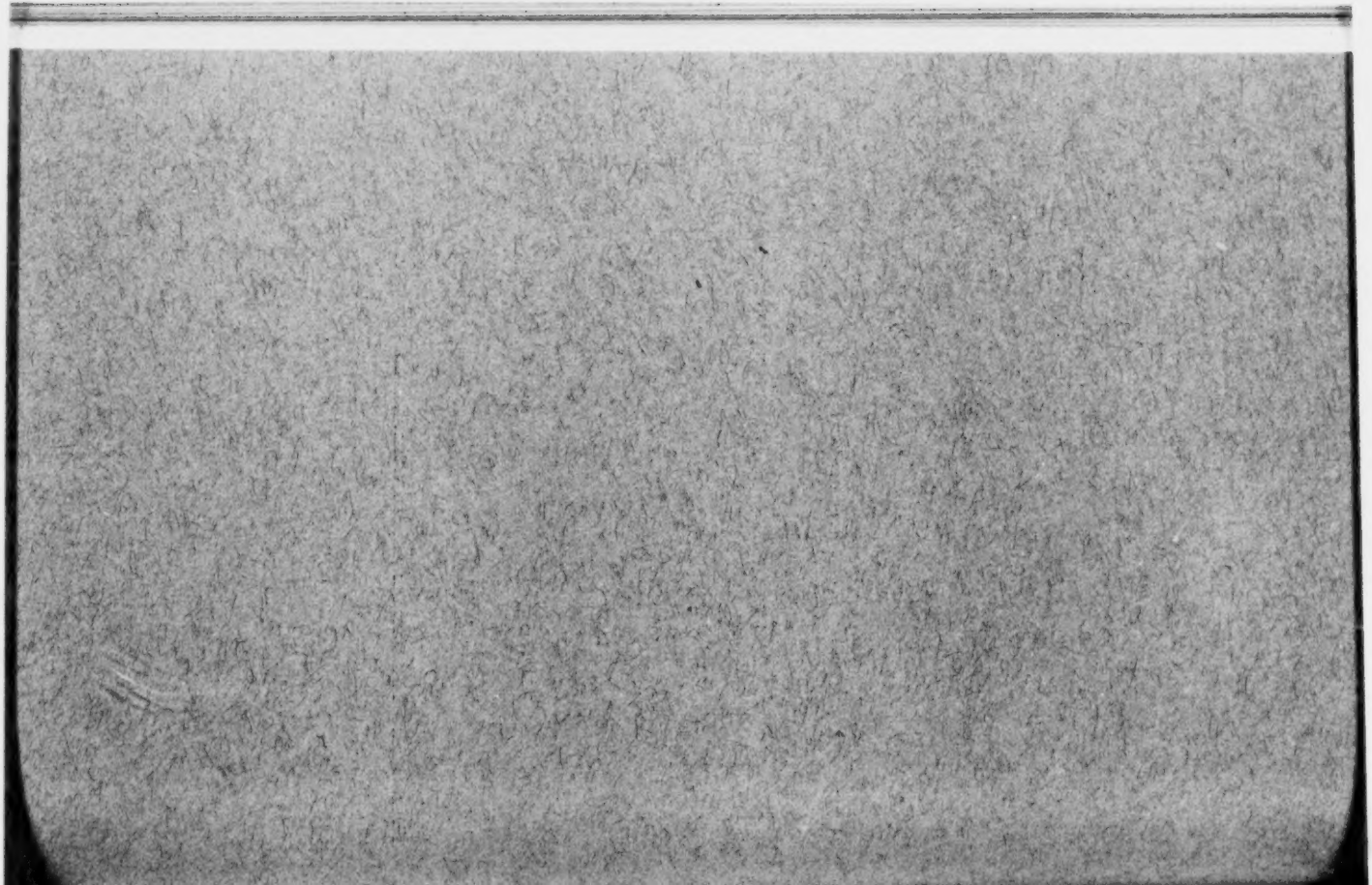
M. P. DEFEO AND LENA DEFEO, HIS WIFE,
PETITIONERS

v.

THE UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION



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CITATIONS

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OPINIONS BELOW

The opinion of the district court (R. 223–230) is reported in 47 F. Supp. 688. The opinion of the circuit court of appeals (R. 267–270) is reported in 139 F. 2d 225.

JURISDICTION

The judgment of the circuit court of appeals sought to be reviewed was entered December 9, 1943 (R. 271). The petition for a writ of certiorari was filed February 29, 1944. The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTION PRESENTED

Whether, under the applicable legislation and the facts of the case, the Secretary of the Interior lawfully cancelled for default in payment of deferred instalments of the purchase price petitioner's application to purchase lands within the Pyramid Lake Indian Reservation in Nevada.

STATUTE INVOLVED

The material portion of the Act of June 7, 1924, 43 Stat. 596, follows:

> *Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,* That the Secretary of the Interior is hereby authorized to sell to settlers or their transferees, under such terms, conditions, and price per acre as the said Secretary may prescribe, any lands in the Pyramid Lake Indian Reservation, in the State of Nevada, that have been settled upon, occupied, and improved by said settlers and their transferees in good faith for a period of twenty-one years or more immediately preceding the passage of this Act: *Provided,* That no more than six hundred and forty acres shall be sold to any one person or corporation: *Provided further,* That said sales shall be by private cash entry after it has been shown to the satisfaction of the Secretary of the Interior that the lands applied for have been settled upon, occupied, and improved as required by this Act, and in addition to such price per acre as may be fixed by the Secretary of the Interior all entrymen hereunder shall

pay the same fees and commissions as provided by law where public lands are disposed of at $1.25 per acre. The proceeds of said sales shall be deposited in the Treasury of the United States and be subject to appropriations by Congress for the Piute Indians of the said Pyramid Lake Indian Reservation.

* * * * *

SEC. 4. All sales in accordance with section 1 of this Act shall be made through the local land office within ninety days after the price of the land shall have been fixed by the Secretary of the Interior: *Provided,* That where entry is not made within the time specified, the United States shall enter upon the premises and take possession thereof for the use and benefit of the Piute Indians of the Pyramid Lake Indian Reservation.

STATEMENT

The Pyramid Lake Indian Reservation was established by formal action of the Department of the Interior in 1859.[1] In 1861 some of the lands

[1] The district court found that the reservation was established in 1874 (R. 236). The difference in dates is immaterial. The Executive Order of March 23, 1874, referred to in the opinion of the trial court (R. 236) merely gave formal sanction to an accomplished fact and was not necessary to the establishment of the reservation. See *United States* v. *Walker River Irr. District*, 104 F. (2d) 334 (C. C. A. 9), at pp. 338–339:

"The Walker River reservation as originally defined was surveyed within a few years, and in 1874 President Grant issued an executive order setting the lands apart for the Pahute and other Indians residing thereon. The action

included within the boundaries of the reservation were occupied by white men. Although they had no title to the lands, these men or their successors continued in occupancy thereof (R. 232). By the Act of June 7, 1924, *supra,* Congress made provision that they or their successors might purchase the lands they occupied "under such terms, conditions, and price per acre" as the Secretary of the Interior might prescribe.

Pursuant to this legislation the Secretary in March of 1925 promulgated regulations directing that the settlers be allowed ninety days from February 7, 1925, within which to purchase the land and pay the appraised price therefor (R. 37–56, 238). In the following May he modified these regulations to permit the settlers to pay the purchase price in instalments—one-fourth down and the balance in three equal annual payments with interest at five percent per annum (R. 238). Twelve of the settlers applied to purchase lands

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taken in November, 1859 initiated the establishment of the Walker River Indian Reservation. The acts of the heads of departments are the acts of the executive. *Wilcox* v. *Jackson*, 13 Pet. 498, 513, 10 L. Ed. 264; *Wolsey* v. *Chapman*, 101 U. S. 755, 769, 25 L. Ed. 915. The subsequent proclamation of the President merely gave formal sanction to an accomplished fact. *Northern Pac. Ry. Co.* v. *Wismer*, 246 U. S. 283, 38 S. Ct. 240, 62 L. Ed. 716; *Minnesota* v. *Hitchcock*, 185 U. S. 373, 385, 389, 390, 22 S. Ct. 650, 46 L. Ed. 954. That this was true of the Pyramid Lake reservation, created at the same time and in the same manner as that on the Walker River, was formally determined by the Department of the Interior in *Central Pacific Ry. Co.*, 45 L. D. 502."

and made the down payment, and seven of these ultimately completed their payments and received patents (R. 238).

The remaining five settlers defaulted in the making of their deferred payments (R. 85–86). No action was taken prior to 1931 with respect to their applications because of existing economic conditions and the pendency of proposed legislation to reduce the purchase price (R. 239). In September of 1931 the settlers were given ninety days within which to pay the full deferred balance and interest, but in December of 1931, before the expiration of the ninety days, the order was modified and they were allowed until January 31, 1932, to pay one-third of the balance and interest (R. 239). At the same time they were advised that, in the case of default and in the absence of an appeal to the Secretary of the Interior, their applications would be cancelled, all moneys theretofore paid would be forfeited, and the cases closed (R. 239). The settlers again defaulted, but no action was taken on their applications pending consideration of a Senate resolution which required the Department of the Interior to withhold further collections from the settlers until a Senate committee could investigate regarding the existing appraisals (R. 239).

In May of 1935 the settlers were granted a reduction in the purchase prices and the rate of interest and were allowed thirty days within which to pay the principal and interest in full or to pay

the interest only (R. 240). Again they were warned that their applications would be cancelled and all moneys forfeited unless proper payment was made or an appeal taken to the Secretary (R. 67–68, 240). The settlers appealed for a further reduction of the purchase price (R. 240). In March of 1936 they were notified that the Secretary required that the interest due should be paid within thirty days; that one-third of the unpaid principal should be paid within six months; and that if they failed in this, their applications would be cancelled without further notice (R. 240). No right of appeal from this final decision was granted. The settlers failed to pay the interest as required, and in May of 1936 the Secretary ordered their applications cancelled (R. 240). Notice of cancellation was given to them (R. 173, 242), and in June of 1936 they were requested to vacate the lands by September of that year (R. 149–150).

The defaulting applicants failed to remove from the lands as required, and in February of 1938 the United States filed separate eviction actions against them (R. 23–24).[2] In these actions the settlers defended on the ground that, under the Act of June 7, 1924, *supra*, the Secretary of the

[2] The filing of these suits was delayed until it became apparent that S. 840, 75th Congress, a bill to authorize the Secretary to issue patents to the settlers upon payment of the full balance of the purchase price and which had passed the Senate, would not be submitted to a vote in the House.

Interior had no authority to cancel their applications. In four of the cases the defendants alleged willingness to make full payment. In the fifth, which is the one here involved, the defendant alleged that he had tendered and the United States had accepted full payment (R. 28–36). The district court held four of the cases in abeyance and entered judgment of dismissal in the other, holding that the Secretary could not cancel the application because the 1924 Act gave him no express power to do so and cancellation of defendant's application and disturbance of his possession would be unjust and inequitable. *United States* v. *Garaventa Land and Livestock Co.*, 38 F. Supp. 191 (D. C. Nev.)

The circuit court of appeals reversed the *Garaventa* case. It held that, under the Act of June 7, 1924, *supra*, the Secretary could permit the settlers to make payment in instalments and could impose the condition that if deferred instalments were not paid on time the down payments and the settlers' right should be forfeited; that the settlers in default would not be heard to claim the benefit of making payments in instalments but to disavow the burdens; and that principles of equity could not be applied so as to defeat the Secretary's power of cancellation under the statute. The court added that if the United States had any duty of liberality toward the settlers, "the duty has been fulfilled by nearly seventeen years of indulgence." 129 F. 2d 416.

The district court thereafter entered judgment in favor of the United States in all the cases except the present one against the Depaolis (R. 224). Facts specially pertaining to this case had been developed at the trial, as follows: on August 14, 1936, three months after the Secretary had cancelled his application, Mr. Depaoli had filed with the Register of the United States Land Office at Carson City, Nevada, a petition for reinstatement thereof, accompanied with a deposit of the full amount of unpaid principal and interest (R. 103–106). On September 30, 1936, the Secretary rejected the petition and simultaneously ordered the return of the amount deposited with the application (R. 100–102). As indicated in the Secretary's letter of rejection, upon cancellation of petitioner's application in May of 1936 the land covered thereby had reverted to Indian ownership and the Secretary was therefore without legal power to grant the petition for reinstatement or to accept the tender of payment. Under the Indian Reorganization Act of June 18, 1934 (48 Stat. 984) and the constitution adopted thereunder by the Pyramid Lake Paiute Tribe the Tribal Council was vested with full authority to veto any sale of tribal lands (R. 101). However, notwithstanding the rejection, the deposit, through error, was not actually returned until April of 1939, when Depaoli received a Government check,

which he returned to the Federal Reserve Bank at San Francisco (R. 243, 268)[3]

On these facts, the district court concluded that the instant case was analogous to a transaction between an ordinary vendor and vendee and, applying principles of equity, held that, even though the cancellation of the application was valid when made, it had subsequently been rendered ineffectual by the delay of more than two and one-half years before actual return of the amount deposited with the petition for reinstatement, particularly in view of Depaoli's claim that because of the depression he was unable to pay the full purchase price prior to the cancellation (R. 229–230).

Judgment was thereafter entered for the defendants (R. 223). The circuit court of appeals

[3] The record does not explain the delay, but the circuit court of appeals was advised of the following facts: The certificate covering Depaoli's deposit had been erroneously endorsed "Pyramid Lake Lands" by the Register of the local land office, and the deposit had been covered into the Treasury in August of 1936 as "Piute Indian Lands—Pyramid Lake Reservation, Nevada," where it was not subject to return until correction of the error. Correction was made in July of 1937, and the deposit placed in a special receipt account, "Deposits, Unearned Proceeds, Lands, etc., General Land Office, Carson City, Nevada." Through inadvertence no further action was taken toward returning the money until Depaoli's defense of full payment was called to the attention of the Department of the Interior and an investigation made, which resulted in the Register's being requested to prepare a refund voucher in March of 1939.

reversed, holding on authority of the *Garaventa* case that the Secretary's rejection of the petition for reinstatement was of equal authority and finality with his cancellation of the application, and that the delay in the return of the deposit did not work an estoppel against the United States (R. 269–270).[4]

[4] S. 24, a bill which would authorize the Secretary of the Interior to issue patents to the five defaulting settlers upon payment of the full balance of the purchase price, passed the Senate. The House Committee on Indian Affairs recommended passage, but following extensive hearings voted to rescind its prior favorable action, and no further action has been taken. Similar bills had been introduced in the 75th, 76th and 77th Congresses, had passed the Senate, but failed of being submitted to a vote in the House. S. Rep. No. 80, 78th Cong., 1st sess. (1943), p. 1.

The Department of the Interior has opposed enactment of these measures on the grounds: (1) that the right of the Pyramid Lake Paiute Tribe to possession of these lands is prior and superior, morally and legally, to that of the non-Indian settlers; (2) that the land having been confirmed in Indian ownership in 1936, after failure of certain settlers to meet the terms offered, action divesting the Indians of such ownership would be inconsistent with pledges of the Federal Government embodied in the Act of June 18, 1934 (48 Stat. 984) and in the tribal constitution and corporate charter issued thereunder; (3) that if the settlers have any equitable claims they are based upon the encouragement given them through the laxness of the Government in protecting Indian lands against trespass, rather than upon any acts or omissions of the Indians, and such equitable claims should therefore be settled between the settlers and the Government, preferably by a relief bill for the payment of damages, rather than by depriving the Indians of their lands.

ARGUMENT

The Act of June 7, 1924, empowered the Secretary to fix the price and the terms and conditions for the sale of the land. Hence, he could authorize payment in instalments and could impose the condition of forfeiture for default in the deferred payments. Cf. *Cosmos Co.* v. *Gray Eagle Co.*, 190 U. S. 301, 309; *Cameron* v. *United States*, 252 U. S. 450, 459–463. Since petitioners did not make payment within the time he prescribed, they acquired no right in the land. Therefore, they may not properly seek the protection of equity for a right which they do not have. Cf. *Yosemite Valley Case*, 15 Wall. 77, 87; *Northern Pacific Railroad Co.* v. *Smith*, 171 U. S. 260, 269. Nor may they rightfully invoke equitable principles to invalidate the Secretary's cancellation of their application to purchase the land, for otherwise the plain policy of the statute, which was to sell the land but only upon compliance with terms and conditions fixed by the Secretary of the Interior, would be thwarted. *Utah Power & Light Co.* v. *United States*, 243 U. S. 389, 409. Further, petitioners ought not to be heard to complain of the Secretary's act in canceling their application and forfeiting their initial payment when that was the condition of the privilege which they accepted of making payment in instalments and at a reduced price. Accordingly, the Secretary properly rejected their petition for reinstatement, inasmuch

as he acted within his authority in canceling their entry and intended the cancellation to be final (R. 101–102). The delay in the return of the deposit which accompanied the petition for reinstatement is wholly immaterial because, the delay having resulted from the errors of subordinate employees, it cannot prejudice the rights of the United States. *Wilber National Bank* v. *United States*, 294 U. S. 120, 123–124 (1935).

If the circuit court of appeals was wrong in stating in the *Garaventa* case (see (Pet. 41) that "any duty with respect to liberality toward the settlers * * * has been fulfilled by nearly seventeen years of indulgence," any remaining equities of petitioners should be considered by the Congress, which alone has power to make relief appropriations if it considers such action appropriate.

CONCLUSION

The decision below involves no conflict and is correct. It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

CHARLES FAHY,
Solicitor General.
NORMAN M. LITTELL,
Assistant Attorney General.
CHESTER T. LANE,
Special Assistant to the Attorney General.
NORMAN MACDONALD,
JOHN C. HARRINGTON,
Attorneys.

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